BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL A. FRANZEL	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,049,195
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the January 21, 2011 Award by Administrative Law Judge (ALJ) Marcia Yates Roberts. The Board heard oral argument on May 4, 2011.

APPEARANCES

William W. Hutton, of Kansas City, Kansas, appeared for the claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. Although initially disputed, respondent concedes claimant sustained a compensable injury. Accordingly, the only issues to be decided in this appeal are the nature and extent of claimant's impairment, his entitlement to future medical benefits and the admissibility of the Employer's Report of Injury dated November 16, 2009.

ISSUES

After reviewing the record and hearing claimant's Regular Hearing testimony, the ALJ adopted the opinions of Dr. Vito Carabetta, the court-appointed independent medical

examiner, and awarded claimant a 33 percent permanent partial impairment to the left lower extremity (at the level of the knee),[1] and awarded future medical treatment pursuant to K.S.A. 44-510k. The ALJ's Award specifically excluded from evidence the Employer's Report of Injury, referencing the Court of Appeals' opinion in *Bearce*.[2]

Respondent appealed this decision alleging the ALJ's reliance upon Dr. Carabetta's opinions was inappropriate as Dr. Carabetta failed to correctly utilize or follow the *Guides*. Respondent contends the more appropriate rating is the 3 percent impairment to the knee offered by Dr. Mark Rasmussen, and which acknowledges claimant's obesity, middle age and "severe preexisting degenerative joint disease in both knees" as well as claimant's prior surgical procedures in both knees.[3] Respondent asks the Board to modify the ALJ's Award to reflect Dr. Rasmussen's evaluation of claimant's permanent impairment and to reject claimant's request for future medical benefits. Respondent argues that both physicians have opined that claimant's inevitable need for a total left knee replacement is unrelated to this accident. Thus, respondent maintains claimant is not entitled to future medical benefits. Respondent also argues that the ALJ erred in excluding the Employer's Report of Injury from evidence.

Claimant argues that the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The primary issue to be resolved in this appeal is the nature and extent of claimant's impairment as a result of his November 5, 2009 accident. Although respondent concedes an accident occurred, it makes much of a perceived inconsistency in claimant's recitation of the facts surrounding his accidental injury. Claimant's job in facilities management required him to engage in a number of maintenance duties, including the installation of light fixtures. On November 5, 2009, claimant was in the process of installing some light fixtures which required him to climb up and down a ladder while carrying the necessary tools, a number of times over the course of the day. While performing this job, he came down the ladder and apparently missed a step and came down hard. He heard a "pop" and felt a

---

[1] All ratings referenced herein utilize the 4th edition of the *Guides* (American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.) and are to the left knee.

[2] ALJ Award (Jan. 21, 2011) at 4, citing *Bearce v. United Methodist Homes*, 170 P.3d 443 (Unpublished Court of Appeals Opinion, No. 97,879, Nov. 16, 2007), 2007 WL 4105377.

[3] *Id.* at 3.

burning sensation in his left knee. Claimant notified his employer and treatment was provided.

Claimant acknowledged that he had undergone surgery to his left knee 13 years before the November 2009 accident. That surgery, performed by Dr. Munns, repaired a torn meniscus and in the process, removed some cartilage. He was not given any permanent impairment or restrictions as a result of this procedure and did not assert any workers compensation claim. There is also evidence within the record that indicates claimant sustained an injury to his right knee in 2005 that resulted in a complex tear of the medial meniscus.[4] After that time, there is no indication in the record that claimant was working under any sort of permanent restrictions and in fact, claimant indicated that he was able to perform his normal work duties without any problem or complaint up until November 5, 2009.

After his accident and being seen by the physician at the occupational facility, claimant was provided with conservative treatment in the form of medication, crutches and x-rays and ultimately an MRI was performed. Claimant was then referred to Dr. Rasmussen.

Dr. Mark Rasmussen, a board certified orthopaedic surgeon, first began seeing claimant on January 10, 2010. After his examination, he diagnosed claimant with osteoarthritis. He also concluded that claimant was suffering from bilateral flexion contracture[5] and varus alignment[6]. Both of these conditions are typically seen in patients who are suffering from arthritis.

He testified that the x-rays taken of claimant's left knee revealed that claimant had no more cartilage in his left knee and was, in fact, bone-on-bone. However, Dr. Rasmussen later contradicted himself as he also testified that claimant *did* retain some cartilage in the medial compartments in both knees.[7] However, he did not measure that cartilage. Dr. Rasmussen testified that claimant's accidental injury aggravated his osteoarthritis and in order to return claimant to his baseline, claimant was provided with

---

[4] Carabetta Depo. at 18.

[5] This condition involves an inability for the patient to completely straighten out the leg and when present, ultimately will alter the patient's stride length. The more the knee wears out, the more likely the extent of flexion contracture will increase.

[6] Varus alignment is a condition whereby the inside of the knee is worn out. Typically 80 percent of arthritic sufferers also grapple with this condition.

[7] Rasmussen Depo. at 4.

injections and physical therapy. He went on to opine that independent of the accident, it is "inevitable" that claimant will require a knee replacement at some point in the future.[8]

Dr. Rasmussen assigned a 3 percent permanent partial impairment based upon the 4th edition of the *Guides*.[9] At his deposition, he made it clear that this 3 percent was solely for the aggravation of the arthritis, not the underlying degenerative condition itself as he believed the job did not cause the arthritis.[10] In an attempt to explain claimant's present condition, he commented on the effect of the claimant's earlier 1998 surgery to the left knee. Dr. Rasmussen explained that:

> When you remove a meniscus, with time your risk of developing osteoarthritis is significantly higher, so over the next ten or 20 years your risk of developing an arthritic knee is much higher than if you were able to maintain your meniscus.[11]

Put another way, the 1998 surgery removed some of claimant's "rubber", leaving him vulnerable to future injury.[12] According to Dr. Rasmussen, claimant's knee was worn out before he went up and down the ladder on November 5, 2009. Based upon his belief that claimant had no cartilage and was bone-on-bone before his accident, and remains that way now, albeit with additional symptoms, he contends claimant has no additional impairment other than the 3 percent for the aggravation of the arthritis.

At the Court's direction, claimant was examined by Dr. Carabetta, a physiatrist. Like Dr. Rasmussen, Dr. Carabetta diagnosed claimant with left knee osteoarthritis, which admittedly predated the claimant's November 5, 2009 accident. Dr. Carabetta concluded that claimant's work activities took their toll on claimant's knee and the day he stepped down from the ladder was "the day of accounting."[13]

His review of the claimant's medical records led him to opine that claimant's left knee was not yet bone-on-bone as of the date of his MRI, November 23, 2009. He noted that "[s]ome cartilage was described as being present in the articulation between the femur

---

[8] *Id.* at 5-7.

[9] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted. Although the ALJ's Award indicates that Dr. Rasmussen failed to indicate which edition of the *Guides* was used, this is inaccurate. He expressly testified that his 3 percent impairment assessment was made pursuant to the 4th edition of the *Guides.* Rasmussen Depo. at 6.

[10] Rasmussen Depo. at 6.

[11] *Id.* at 9.

[12] *Id.* at 10.

[13] Carabetta Depo. at 29-30.

and tibia."[14] Based upon this finding, and utilizing Table 62 contained within the *Guides*, he opined that a maximum of 25 percent impairment of the left lower extremity would be present. And because claimant has limited patellofemoral arthritis, he was entitled to an additional 10 percent impairment.[15] When properly combined, Dr. Carabetta ultimately assigned a 33 percent permanent partial impairment to the left lower extremity.

When asked about claimant's prospects for future medical treatment, Dr. Carabetta testified that he "sincerely doubted" that claimant would need additional treatment as a result of this injury alone.[16]

The ALJ adopted the opinions expressed by Dr. Carabetta and assigned a 33 percent permanent partial impairment to claimant's left lower extremity. She dismissed respondent's argument by finding that "[t]he record is absent of any evidence that claimant's pre-existing arthritis was symptomatic prior to his injury so there will be no reduction in the impairment for that condition."[17]

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[18] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[19]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[20]

Here, the essence of respondent's argument is that claimant's left knee was already impaired, before the accident that occurred on November 5, 2009. Specifically, claimant's left knee was bone-on-bone (according to Dr. Rasmussen) both before and after his

---

[14] Dr. Carabetta's July 20, 2010 IME report at 3.

[15] *Id.*

[16] Carabetta's Depo. at 29-30.

[17] ALJ Award (Jan. 21, 2011) at 4.

[18] K.S.A. 2009 Supp. 44-501(a).

[19] K.S.A. 2009 Supp. 44-508(g).

[20] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

accident. And that the onset of his symptoms is attributable to the aggravation of his pre-existing arthritic condition, which was rated at 3 percent. Dr. Rasmussen did not offer any opinion as to claimant's pre-existing permanent impairment.

After considering the entire record, the ALJ was more persuaded by the opinions expressed by Dr. Carabetta, the independent medical examiner, over those expressed by Dr. Rasmussen. She also went on to conclude that "[t]he record is absent of any evidence that claimant's pre-existing arthritis was symptomatic prior to his injury so there will be no reduction in the impairment for that condition."[21]

The Board has reviewed the medical testimony in this matter and agrees with the ALJ. Dr. Rasmussen equivocates as to whether claimant's knee was bone-on-bone. Moreover, Table 62, which is used to rate knee impairments clearly requires the evaluator to consider the extent of the remaining cartilage contained within the knee. Dr. Carabetta reviewed the MRI results and concluded that cartilage remained and thus, claimant was not, as Dr. Rasmussen initially said, bone-on-bone. And the comments to Table 62, which are contained within this record, show that an injured employee's symptoms are to be considered when determining the appropriate rating.[22] Put another way, there is nothing within this record or within this section of the *Guides* that indicates that symptoms *are* irrelevant when determining an impairment rating to the knee. Taking all of these aspects together, and utilizing Table 62, Dr. Carabetta assigned a 25 percent impairment and that, coupled with an additional 10 percent for the aggravation of the arthritic condition, he concluded claimant bore a 33 percent permanent partial impairment.

Given the fact that claimant had no symptoms before his November 5, 2009 accident and after his accident, he suffered immediate pain and the onset of lasting symptoms, the Board finds Dr. Carabetta's impairment analysis to be more persuasive and appropriate. It is respondent's burden to prove the percentage of preexisting impairment under K.S.A. 44-501(c).[23] Here, respondent failed in this burden because no doctor gave an opinion as to the percentage of preeixsting impairment. Thus, the ALJ's conclusion that claimant sustained a 33 percent permanent impairment is affirmed.

The ALJ granted claimant's request that he be allowed to retain the right to seek additional future medical pursuant to K.S.A. 44-510k. The Board affirms this finding. While the medical testimony suggests that claimant may require a knee replacement at some point in the future and that his pre-existing arthritis may be a component in that decision, it is not for the Board to decide this issue at this juncture of the claim.

---

[21] ALJ Award (Jan. 21, 2011) at 4.

[22] Carabetta Depo., Ex. 1.

[23] *Hanson vs. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

As for the admissibility of the Employer's Report of Injury, the ALJ excluded this based upon the Court of Appeals' decision in *Bearce*.[24] That decision determined that such reports are excluded only when claimant's ultimately die of their work-related injuries. The ALJ's decision to exclude the report, while citing *Bearce* is perplexing. Claimant in this action did not die. Thus, under the rationale of *Bearce*, it is admissible. Thus, the ALJ's determination on that issue is reversed. Nevertheless, the admissibility of this report does not alter the Board's ultimate conclusions and its importance was largely diminished when respondent conceded liability for the accident.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Marcia Yates Roberts dated January 21, 2011, is affirmed in every respect except as it relates to the ALJ's finding on the admissibility of the Employer's Report of Injury, which is reversed.

IT IS SO ORDERED.

Dated this _____ day of May 2011.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: William W. Hutton, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge

[24] *Bearce v. United Methodist Homes*, 170 P.3d 443 (Unpublished Court of Appeals Opinion, No. 97,879, Nov. 16, 2007), 2007 WL 4105377.